LMM(80)38

APPEALS AGAINST ACQUITTALS AND SENTENCES

Memorandum by the Government of Sri Lanka

Criminal Jurisdiction is exercised by the Magistrate's Courts and by the High Courts in accordance with the provisions of the Code of Criminal Procedure Act No. 15 of 1979 and the Judicature Act No. 2 of 1978. The Primary Courts exercise criminal jurisdiction in terms of the said Judicature Act.

2. The Code of the Criminal Procedure Act No. 15 of 1979, contains the following provisions in regard to appeals from an acquittal in the Magistrate's Courts.

> 318. An appeal shall not lie from an acquittal by a Magistrate's Court except at the instance or with the written sanction of the Attorney-General.
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> 319. Where a Magistrate's Court has refused to issue process a mandamus shall lie to compel such court to issue such process, but an appeal shall not lie against such refusal except at the instance or with the written sanction of the Attorney-General.

3. Sections 336 and 337 of the said Code, provide for appeals from sentences passed and acquittals entered by the High Courts when accused persons are tried on indictment.

> 336. On an appeal against the sentence whether passed after trial by jury or without a jury, the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence, and pass other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed and in any other case shall dismiss the appeal.
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> 337. (1) In an appeal from an order of acquittal, the Court of Appeal may reverse such order and direct the accused to be re-tried or find him guilty of the same or a different offence of which the accused person could have been found guilty on the indictment and pass sentence on him according to law.
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> (2) In an appeal from any other order, the Court of Appeal may alter or reverse or set aside such order or make such order in substitution for the order of the High Court as may be warranted by law.

4. The Attorney-General is given an extended period of time, namely, 28 days, within which he could appeal or sanction an appeal to the Court of Appeal. Any other person who is dissatisfied with any judgment or final order of any Magistrate's Court or of the High Court, has to prefer an appeal within 14 days of such judgment or order.

5. Section 15 of the Judicature Act No. 2 of 1978 gives the Attorney-General a specific right of appeal from an order of acquittal by a High Court and also in respect of inadequate or illegal sentences imposed by the High Court.

> 15. The Attorney-General may appeal to the Court of Appeal in the following cases:—
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> (a) from an order of acquittal by a High Court—
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> (i) on a question of law alone in a trial with or without a jury;
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> (ii) on a question of fact alone or on a question of mixed law and fact with leave of the Court of Appeal first had and obtained in a trial without a jury;
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> (a) in all cases on the ground of inadequacy or illegality of the sentence imposed or illegality of any other order of the High Court.

6. Hitherto, the Attorney-General had no right of appeal whatever, from a verdict of acquittal entered in a trial by a jury. For the first time, a limited right of appeal from a verdict of acquittal in a trial by jury has been granted by the aforesaid provision of law.

7. It is only the Attorney-General who could appeal or grant sanction to appeal from an acquittal entered in a criminal proceeding. Although the Code itself draws no distinction between the powers of the Court of Appeal to interfere in an appeal from a conviction on the one hand and from an acquittal on the other, yet judicial decisions have interpreted restrictively the powers of the Court in relation to appeals from acquittals. It is an elementary principle that no man should be twice placed in jeopardy for the same offence and an appeal from an acquittal is usually confined to a question of law. It is only in very exceptional circumstances that the Attorney-General would appeal on questions of fact. Justice Akbar in the case of *King* v. *Mack and Carron* (XI Ceylon Law Recorder 1) stated:

> The learned Solicitor-General frankly admitted at the very outset of his argument that he had a heavy burden to dischage in this appeal. He admitted that such an appeal on a question of fact from an acquittal...could only be justified if there had been a palpable misdirection by the District Judge when considering the facts of the case which—to use the Solicitor-General's words—could be demonstrated to be wrong on the very face of the record. Or, in other words, his appeal could only be justified if the misdirection was obvious and had in effect resulted in a miscarriage of justice.

8. The principles which govern an appeal from an acquittal were again emphasised by the Supreme Court in a judgment delivered in 1931:

> An appeal from an acquittal is a remedy which has no place in most parts of the British Empire. The general rule is that if a person has been fairly and properly tried and acquitted, he ought not to be put in jeopardy a second time for the same offence. .... It is obviously not sufficient that the Court should think that there is material on which another Magistrate might come to the conclusion that the accused was guilty. It must, I think, be satisfied that no other conclusion was reasonably possible but that the accused was guilty or that the

Magistrate did not apply his mind to the whole evidence in the case. Per Lyall Grant, J., *Fernando* v. *Peiris* 33 New Law Reports 71, 72.

9. As regards enhancement of sentences, the procedure that prevailed prior to the enactment of the Code of Criminal Procedure Act No. 15 of 1979, was for the Attorney-General to invoke the revisionary powers of the Supreme Court. The said Code, however, gives a specific right of appeal against sentence. It is well settled that an appellate court will not interfere with the discretion of the trial judge in the matter of sentence, unless the sentence imposed is *manifestly* inadequate or is illegal or the discretion has been exercised on a wrong principle.

10. *Attorney-General* v. *H. N. de Silva* (1955) 57 New Law Reports 121, was a case where the accused, who was a public officer, pleaded guilty to charges of forgery and the trial judge had ordered the accused to enter into a bond in a sum of Rs. 300/= with one surety to be of good behaviour for two years. The court imposed neither a term of imprisonment nor a fine, having regard to the following facts:

(a) that the accused was about 22 years of age;

(b) he would be discontinued from service; and

(c) his previous good character.

The Attorney-General moved to revise sentence and Basnayake, Acting Chief Justice, in the course of his judgment stated as follows:

> This Court has power in the exercise of its revisionary jurisdiction to increase or reduce a sentence, and it is not contrary to the rules which apply to appellate tribunals that it should exercise its independent judgment in a matter which is brought up before it in review and increase a sentence if it thinks it should be increased. Learned Counsel for the respondent urged that the quantum of sentence is a matter for the discretion of the trial Judge and that the Court of Appeal ought not to interfere, unless it appears that the trial Judge proceeded upon a wrong principle. He cited a number of cases which state the principles which should guide an appellate tribunal in altering a sentence passed by a Court of subordinate jurisdiction. Those cases quite properly lay down the rule that an appellate Court will interfere only when a sentence appears to err in principle or when the subordinate Court has either failed to exercise its discretion or has exercised it improperly or wrongly. (at p. 123).
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> In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail.
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> A Government servant would invariably be a person of good character for he would not be in the service if he were not so. The fact that a Government or other servant would lose his employment by the conviction is not a sound reason for not imposing a term of imprisonment where his offence merits it. It is of vital importance that the confidence of the public in the services managed by the State should be preserved. In the same way in the case of a professional man the fact that the conviction would deprive him of membership of the professional body to which he belongs affords no valid ground for not sentencing him to imprisonment for a grave crime involving his honesty or integrity. (at p. 124).